

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUDOLPH B. THOMPSON JR.)	
Claimant)	
VS.)	
)	Docket No. 210,700
LADY BALTIMORE FOODS, INC.)	
Respondent)	
AND)	
)	
SELF-INSURED)	
Insurance Carrier)	

ORDER

Claimant appealed the February 11, 1999 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument in Kansas City, Kansas, on June 15, 1999.

APPEARANCES

Constance L. Shidler of Overland Park, Kansas, appeared for the claimant. Kip A. Kubin of Overland Park, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, the record includes Dr. Mark J. Maguire's medical report dated January 27, 1997, as that report was requested by Judge Foerschler and is admissible pursuant to statute and regulation.¹

ISSUES

This is a claim for a series of accidents and mini-traumas to claimant's shoulders beginning on April 1, 1994, and continuing through January 23, 1995, the last day that he worked for the respondent before having right shoulder surgery. After finding that claimant terminated his employment in August 1996 for personal reasons unrelated to his shoulder

¹ See K.S.A. 44-510e(a), K.S.A. 44-516, and K.A.R. 51-9-6.

injuries, Judge Foerschler used the functional impairment rating and awarded claimant a 12 percent permanent partial general disability. The Judge found January 25, 1995, as the date of accident.

Claimant contends the Judge erred by limiting his award to the functional impairment rating. Claimant contends that he was forced to terminate his employment with the respondent as his "accommodated" job evolved to include duties that violated his permanent work restrictions and limitations. He argues that he has a 60 percent task loss and a 28 percent wage loss, which would yield a 44 percent permanent partial general disability. He also argues that the appropriate date of accident for this claim is January 23, 1995, the last day that he worked for the respondent before having surgery, and that his average weekly wage for that accident date is \$607.74.

Conversely, respondent argues that it provided an accommodated job to claimant and, therefore, the permanent partial general disability should be limited to the functional impairment rating. Additionally, respondent argues the appropriate date of accident is April 1, 1994, the approximate date that claimant reported his shoulder symptoms to the respondent and the approximate date that temporary medical restrictions were first given. Also, respondent argues that the appropriate average weekly wage for an April 1994 accident is \$518.88 and for a January 23, 1995 accident is \$543.81.

The only issues before the Board on this appeal are:

1. What is the appropriate date of accident?
2. What is claimant's average weekly wage?
3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Mr. Thompson began working for Lady Baltimore Foods, Inc., in 1989 as an order filler. That job required Mr. Thompson to go through the company warehouse and load cases, boxes, and bags of various food items on a pallet jack for loading onto delivery trucks. Some bags of produce weighed as much as 50 pounds and some weighed as much as 100 pounds. Bags of flour weighed 50 pounds. Some bags of sugar weighed 50 pounds and some weighed 100 pounds. Boxes of frozen beef and boxes of frozen shrimp weighed more than 50 pounds. The cases of the canned goods weighed approximately 40 pounds. Later, Mr. Thompson worked as a loader, which required him to load the food orders onto the delivery trucks. That job also required him to lift and handle the food items as he would sometimes take the items from the pallet jacks and restack them in the trucks.

2. While working for Lady Baltimore, Mr. Thompson began to experience pain in his shoulders. In April 1994, Mr. Thompson reported the shoulder pain to his supervisor and the company then immediately referred Mr. Thompson for medical treatment. After physical therapy failed to cure him, Mr. Thompson was then referred to board certified orthopedic surgeon Dr. Don B. W. Miskew who diagnosed acromioclavicular joint arthritis in both shoulders. After seeing Mr. Thompson for the first time on October 28, 1994, the doctor wrote, in part:

Evidently this 31 year old man has worked at Lady Baltimore first as a picker and now as a truck loader for approximately 5 years. Approximately 2-1/2 years ago, during the time he was working as a picker, he developed insidiously shoulder pain in both shoulders. This will be in the AC joint area. His pain became increasingly more severe that he sought medical treatment at Occupational Health Services in April of 1994. . . .

His problem is not related to any specific injury, but is specifically related to multiple times of lifting over the last 2-1/2 years. **He is getting progressively worse** and various motions of his shoulder, which are not always repetitive, he will have sudden sharp pains and aching of the shoulders.

. . .

It is my impression this man's problem is secondary to bilateral acromioclavicular joint arthritis. . . . In the long run I feel with his heavy lifting activities, he is going to continue to have pain in these shoulders and the pain might become severe enough that a distal clavicle resection surgically maybe [sic] considered in the future. At present he is able to do his full duty work, but does have pain which is helped with the Lodine. . . . (Emphasis added.)

3. On January 24, 1995, Dr. Miskew operated on the right shoulder and resected the distal clavicle and performed an arthroplasty on the AC joint. On March 28, 1995, the doctor performed the same surgery on the left shoulder.

4. Before having the shoulder surgeries, Mr. Thompson did not miss work due to his shoulders. But starting with his first surgery, Mr. Thompson was off work from approximately January 24, 1995, until May 31, 1995. Although he had restrictions against lifting over shoulder height, from approximately May 31, 1995, through July 9, 1995, Mr. Thompson returned to work at Lady Baltimore loading trucks. Because he was still having pain in his shoulders, Mr. Thompson returned to Dr. Miskew for additional treatment and was again taken off work. On August 23, 1995, Dr. Miskew released Mr. Thompson to return to work but noted that he could not return to his former job. In the doctor's August 23, 1995 office notes, Dr. Miskew mentions that Mr. Thompson was considering selling insurance.

5. On October 16, 1995, Dr. Miskew issued a new work status report indicating that Mr. Thompson was also restricted from lifting over 50 pounds and that the lifting restriction had been erroneously omitted from the earlier work status report.

6. After receiving the new work status report, Lady Baltimore initially determined that it had no job that Mr. Thompson could do. But in October 1995, after Lady Baltimore and its insurance carrier had Mr. Thompson evaluated by a vocational expert, the company created and offered Mr. Thompson a job as an inventory control specialist. That job required Mr. Thompson to count and locate inventory in the company's 500,000-square-foot warehouse, which contained some 15,000 to 16,000 items.

7. Mr. Thompson testified that the inventory job was initially within his work restrictions but it evolved to include salvage duties, which required him once each week to separate, clean, and stack useable items from damaged cartons. Also, on three or four occasions, he helped another employee put up shelves in a freezer. Mr. Thompson now contends those two added job duties forced him to violate his work restrictions and limitations. But Mr. Thompson never advised his immediate supervisor that he was working outside his restrictions or that the job was causing any pain in his shoulders. Further, Mr. Thompson neither returned nor asked to return to Dr. Miskew after their November 22, 1995 visit.

8. After beginning the inventory control job on approximately November 1, 1995, Mr. Thompson worked for Lady Baltimore until he resigned on August 2, 1996 to go into insurance sales. In his resignation letter, Mr. Thompson cited personality conflicts and an unstable work environment as his reasons for resigning. The letter is silent about being unable to do the inventory job or working outside his medical restrictions. Mr. Thompson wrote, in part:

I would like to thank you for the opportunity of being employed with a fine organization such as Lady Baltimore Foods Inc. I have enjoyed my tenure with the company, and have made many friends and experienced a personal growth during the past several years. For the most part I have enjoyed my daily work experience and have always been proud to be a part of the Lady Baltimore Team. It is always a good experience to be involved in a company with values which have been dedicated to Quality and Customer Satisfaction.

Due to conflicts of personality, and a work environment which has become unstable for me, I submit to you, this, my letter of resignation, which becomes effective on August 2, 1996.

I will leave Lady Baltimore with some sadness. Throughout the years, it has been a positive experience. I wish you continued growth and good fortune.

9. Mr. Thompson testified that his letter did not mention that he was working outside his restrictions because he did not want to complain. Although the letter depicts Lady Baltimore in a positive light, Mr. Thompson's testimony describes a cold, indifferent company:

Q. (By Ms. Shidler) So what difference would that have made if you would have put that you were working outside your restrictions in the letter?

A. (By Mr. Thompson) I didn't want to burn any bridges and complain.

Q. Why didn't you complain that the work you were doing in the accommodated position was outside your restrictions?

A. Because I felt that it wouldn't have mattered. You know, I don't think that it would have made any difference to anybody.

Q. What gave you that impression, Rudy?

A. Just, people could see that I was in pain.

10. Upon leaving Lady Baltimore in August 1996, Mr. Thompson began selling life insurance. In April 1998, he then began working for Sitel Corporation as a telemarketer.

11. When Mr. Thompson left work for surgery in January 1995, he was earning \$12.65 per hour and working some overtime. But Mr. Thompson has failed to prove the value of any additional compensation items or fringe benefits that the company may have provided.

12. For a January 23, 1995 date of accident, Mr. Thompson's average weekly wage is \$543.12, which is comprised of \$506 straight time (\$12.65 per hour x 40 hours) and \$37.12 overtime.²

13. Mr. Thompson earned \$13 per hour when he returned to work after surgery for several weeks. The inventory control clerk job that the company created for Mr. Thompson

² The overtime earnings were computed using the pay records introduced at Mr. Eagan's deposition. Although the records omit the five-week period that Mr. Thompson worked from December 24, 1994, through the pay period ending January 27, 1995, the earnings statement from the quarter ending June 30, 1995, provides enough information to determine that \$2,524.69 was paid for those five weeks. Subtracting the gross pay that Mr. Thompson earned in the quarter ending June 30, 1995, which was \$1,661.01, from the year-to-date total shown in that statement, which was \$4,185.70, equals \$2,524.69. Considering that Mr. Thompson's straight time wage was \$506 (\$12.65 x 40) per week and that he averaged only \$504.94 (\$2,524.69 divided by 5) for the five-week period in question, the Board concludes that the pay records fail to prove that Mr. Thompson was paid any overtime during the five-week period from December 24, 1994, through January 27, 1995. Reviewing the quarterly earnings statements for the 26-week period immediately preceding January 27, 1995, indicates that Mr. Thompson earned total overtime of \$965.08, which produces an average overtime amount of \$37.12. Mr. Thompson failed to prove that the other payments shown on the earnings statements are items that would be included in the average weekly wage computation.

paid only \$11.07 per hour when he started on approximately November 1, 1995. But on August 2, 1996 when he resigned, the inventory job was paying \$11.58 per hour and provided some overtime. On the date of resignation, the average weekly wage of the inventory control job was \$490.27 per week, which is comprised of \$463.20 (\$11.58 per hour x 40 hours) straight time and \$27.07 in overtime.³

14. After resigning from Lady Baltimore on August 2, 1996, Mr. Thompson began selling insurance. For the first 65 weeks, Mr. Thompson was salaried and received \$500 per week. After those 65 weeks, he went to straight commission and earned less money. But the record does not provide sufficient information to determine Mr. Thompson's earnings during the period that he was on commission.

15. On approximately April 5, 1998, Mr. Thompson began working as a telemarketer. Using the pay records attached to the November 3, 1998 regular hearing transcript and the transcript of the deposition of Sitel's Mary Anne Woods, the Board finds that Mr. Thompson's average weekly wage as a telemarketer for Sitel Corporation is \$433.56, which is comprised of \$376.76 straight time and overtime,⁴ plus \$56.80 for insurance benefits.

16. Vocational rehabilitation counselor Michael J. Dreiling testified that Mr. Thompson performed 10 job tasks over the 15-year period before injuring his shoulders.

17. Board certified orthopedic surgeon Dr. Edward J. Prostic, who examined Mr. Thompson at his attorney's request in April 1996, testified that Mr. Thompson's work at Lady Baltimore injured his acromioclavicular joints, which caused rotator cuff disease, and which also caused lateral epicondylitis and probably mild carpal tunnel syndrome. Dr. Prostic believes that Mr. Thompson should undergo an MRI of the left shoulder and be provided surgery, if necessary. The doctor also believes Mr. Thompson should have cortisone injections in both his elbow and wrist and should take anti-inflammatory medicines. Dr. Prostic would restrict Mr. Thompson from lifting over 50 pounds, from doing any overhead lifting, and from doing any over-the-shoulder work. Using the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), the doctor rated Mr. Thompson as having a 20 percent whole body functional impairment. Considering the task list prepared by Mr. Dreiling, Dr. Prostic identified 6 of 10, or 60 percent, of Mr. Thompson's former work tasks that he could no longer perform because of his work-related injuries.

³ The earnings records introduced at Mr. Eagan's deposition indicate that Mr. Thompson earned \$703.82 in overtime during the 26 weeks before his resignation on August 2, 1996. Therefore, the weekly overtime average is \$27.07.

⁴ The earnings statements from Sitel Corporation, which represent 18 biweekly pay periods, show that Mr. Thompson averaged 40 hours per week in only two of the 18 pay periods provided. Therefore, the Board concludes that his wages should be determined as a part-time worker. Averaging the gross wage figures from the earnings statements yields \$376.76 per week.

18. The parties deposed Dr. Miskew, who is also a board certified orthopedic surgeon. Not believing the AMA Guides provided an impairment rating either for the resection of a distal clavicle or for Mr. Thompson's residual symptoms, the doctor rated Mr. Thompson without using them. Nevertheless, on cross-examination, the doctor admitted that the AMA Guides do address distal clavicle resection but that he did not know it was there. The doctor believes the AMA Guides are generally inadequate in rating the musculoskeletal system and are especially inadequate in rating the shoulder. The doctor determined that Mr. Thompson sustained a five percent functional impairment to both the right and left upper extremities. He believes Mr. Thompson should neither lift over 50 pounds nor do any overhead lifting.

19. Judge Foerschler requested Dr. Mark J. Maguire to examine and evaluate Mr. Thompson. The doctor diagnosed both bilateral carpal tunnel syndrome and bilateral shoulder pain. In his January 27, 1997 letter to the Judge, the doctor wrote:

Impression: 1. Bilateral early carpal tunnel symptoms. It is difficult to know how long these have been present. It is not noted anywhere on his records, so they may be a more recent onset. I told him the next step in working these up would probably be with and [sic] EMG. 2. His [sic] bilateral shoulder pain. On the right side, I think he may have some component of impingement. I also think he has a fairly large acromioclavicular on that side which may contribute to his symptoms.

I think it could be of some value to obtain a bone scan, to evaluate both shoulders. I think if there is increased uptake in the left shoulder in the area of the acromion, this would indicate this is probably a symptomatic area. On the right side, if there is increased uptake, I think that could indicate still symptoms from the distal clavicle. If these are normal then it is still possible that Mr. Thompson could benefit from an arthroscopic subacromial decompression as I think his symptoms are related partially at least to impingement.

Dr. Maguire believes that Mr. Thompson should be restricted from heavy lifting and from repetitive overhead activities. Using the fourth edition of the AMA Guides, the doctor rated Mr. Thompson as having a 12 percent whole body permanent functional impairment.

20. The Board finds Dr. Maguire's opinions persuasive and affirms Judge Foerschler's finding that Mr. Thompson has a 12 percent whole body permanent functional impairment as a result of his work-related injuries.

21. Dr. Prosic was the only doctor to provide an opinion of task loss. Based upon that opinion, the Board finds that Mr. Thompson lost the ability to do 60 percent of his former work tasks as a result of his shoulder injuries.

CONCLUSIONS OF LAW

1. The most appropriate and most reasonable date of accident for the series of accidents to Mr. Thompson's shoulders is the last day worked before surgery, or January 23, 1995. There is little evidence he sustained additional injury after that date. Further, the Appeals Board concludes that Mr. Thompson resigned from Lady Baltimore to pursue a sales career and not because of the bilateral shoulder injuries. The Board bases this conclusion upon the fact that Mr. Thompson neither complained to his supervisor or the company's safety director, Mr. Larry Eagan, about the inventory job exceeding his medical restrictions, coupled with the fact that Mr. Thompson did not seek additional medical treatment from Dr. Miskew despite the alleged violations of his work restrictions. Therefore, the rule pronounced in Berry,⁵ that the last day worked is the appropriate date of accident when a worker leaves work due to an injury, is not applicable.

2. The Appeals Board concludes that the last day worked before having surgery is the appropriate accident date because Mr. Thompson continued to perform the offending activities through that date. Also, that is the first date, according to Mr. Thompson, that he had any medical restrictions taking him off work. Further, the Board is not persuaded that Mr. Thompson sustained any additional injury during the time that he worked after surgery. Because none of the doctors were asked, there is no medical testimony that Mr. Thompson sustained any additional injury when he worked for that short period during June and July 1995. Conversely, Dr. Miskew's testimony is uncontroverted that Mr. Thompson should have had no problems after the shoulder surgeries. The doctor stated:

Q. (By Ms. Shidler) All right. Do you know what Mr. Thompson's symptoms would likely be following a period of time [post-surgery] where he was lifting heavy weights and working over his shoulder and head height?

A. (By Dr. Miskew) His symptoms should be none, absolutely none.

Q. If he was required to work outside of his restrictions is my question, Doctor.

A. His symptoms should be absolutely none.

Q. Then what's the purpose of the restriction?

A. The purpose of the restriction is his subjective complaints of pain in spite of an excellently done operation and a resection and arthroplasty. He should be painless.

⁵ Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Based upon Dr. Miskew's testimony, the Board concludes that the lifting that Mr. Thompson did for that short period following his surgeries did not cause him additional injury.

3. As set forth above, Mr. Thompson's pre-injury average weekly wage for purposes of computing his award of permanent partial general disability and temporary total disability benefits is \$543.12, which is comprised of \$506 straight time and \$37.12 for overtime.

4. Mr. Thompson is entitled to receive temporary total disability benefits from January 24, 1995, the date that he began missing work for the first of his shoulder surgeries, until May 31, 1995, the approximate date that he returned to work. Additionally, he is entitled to receive temporary total disability benefits for the period from July 9, 1995, the approximate date that he again left work because of shoulder pain, through August 23, 1995, the date that Dr. Miskew released him to again return to work with permanent work restrictions. Therefore, Mr. Thompson is entitled to receive 24.86 weeks of temporary total disability benefits.

5. Bilateral shoulder injuries comprise an "unscheduled" injury. Therefore, K.S.A. 44-510e governs Mr. Thompson's entitlement to permanent partial general disability benefits. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk⁶ and Copeland.⁷ In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based

⁶ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁷ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

6. Mr. Thompson is entitled to receive permanent partial general disability benefits for the period that he returned to work for Lady Baltimore after recovering from his surgeries. For the period that he returned and worked as a loader, May 31, 1995, through July 8, 1995, the permanent partial general disability is the same as the functional impairment rating (12 percent) as Mr. Thompson was earning a weekly wage that was at least 90 percent of that which he was earning at the time of the injury. Therefore, for the period from May 31, 1995, through July 8, 1995, Mr. Thompson is entitled to receive 5.57 weeks of permanent partial general disability benefits.

7. For the period between August 23, 1995, the date Dr. Miskew released Mr. Thompson to return to work, and November 1, 1995, the approximate date that he began the inventory control job, there is an 80 percent permanent partial general disability. During that period, Mr. Thompson was not working and, therefore, he had a 100 percent difference in pre- and post-injury earnings. Averaging the 60 percent task loss with the 100 percent wage difference yields 80 percent. Therefore, for the period from August 23, 1995, through October 31, 1995, Mr. Thompson is entitled to receive 10 weeks of permanent partial general disability benefits.

8. The record does not contain the pay records for the entire period that Mr. Thompson worked in inventory control from approximately November 1, 1995, through August 2, 1996. Nevertheless, the record contains the amount paid Mr. Thompson for the 32 weeks beginning with the pay period ending December 29, 1995, through the pay period ending August 2, 1996. Adding the regular and overtime earnings for that 32-week period, the Appeals Board finds that Mr. Thompson earned \$14,374.19, or approximately \$449.19 per week during that period for which the wage records have been provided. Comparing \$449.19 per week to the pre-injury average weekly wage of \$543.12, the Board concludes that Mr. Thompson had an approximate 17 percent wage loss while working in inventory control. Averaging the 17 percent wage loss with the 60 percent task loss yields an approximate 39 percent permanent partial general disability for the period from November 1, 1995, through August 2, 1996. Therefore, Mr. Thompson is entitled to receive 39.43 weeks of permanent partial general disability benefits for the period in question.

9. After recovering from their injuries, workers are required to make a good faith effort to obtain appropriate employment.⁸ Likewise, workers are also required to make a good faith effort to retain their post-injury employment once they have obtained it. Workers who obtain accommodated work should advise their employer of any problems working within their medical restrictions and should afford the employer reasonable opportunity to adjust the accommodations. Failing to provide the employer with an opportunity to further

⁸ Copeland, *supra*.

accommodate may be considered strong evidence of a lack of good faith.⁹ The Appeals Board concludes that Mr. Thompson failed to make a good faith effort to retain his employment with Lady Baltimore.

10. Finding that Mr. Thompson resigned for personal reasons unrelated to his work-related injuries and that he did not exercise good faith to retain his inventory control job, the Board concludes that the wages that he was earning when he resigned (\$490.27) should be imputed in determining his post-injury wage loss for the period commencing August 2, 1996. Because \$490.27 is within 90 percent of the pre-injury average weekly wage of \$543.12, for the period commencing August 2, 1996, Mr. Thompson's permanent partial general disability reverts to his 12 percent functional impairment rating. A 12 percent permanent partial general disability entitles Mr. Thompson to receive 48.6 weeks of benefits. But that many weeks of permanent partial disability have already accrued in the periods set forth above. Therefore, for the period commencing August 2, 1996, Mr. Thompson is not entitled to receive any additional benefits.

11. For the periods set forth above, Mr. Thompson is entitled to receive an award for 24.86 weeks of temporary total disability benefits and 55 weeks of permanent partial disability benefits.

AWARD

WHEREFORE, the Appeals Board modifies the February 11, 1999 Award as set forth above.

Rudolph B. Thompson Jr. is granted compensation from Lady Baltimore Foods, Inc., for a January 23, 1995 accident and resulting injury. Based upon an average weekly wage of \$543.12, Mr. Thompson is entitled to receive 24.86 weeks of temporary total disability benefits at \$319 per week, or \$7,930.34, followed by 55 weeks of permanent partial disability benefits at \$319 per week, or \$17,545, making a total award of \$25,475.34, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

⁹ Acosta v. National Beef, Appeals Board Docket #206,691 (Feb. 1999); Chavez v. IBP, Inc., Appeals Board Docket #204,408 (Jan. 1999); Hunsecker v. Enterprise Estates Nursing Center, Appeals Board Docket #186,229 (Dec. 1996).

BOARD MEMBER

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BOARD MEMBER

c: Constance L. Shidler, Overland Park, KS
Kip A. Kubin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director